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DIGEST OF INTERNATIONAL LAW

Volume IV

Green Haywood Hackworth

(Excerpts)

Chapter XLV--Intercourse of States

Attaches

(P.401-402)

The duties of attaches are such as may be prescribed for them by the heads of their respective departments, from whom they receive their instructions and to whom they shall report, but such duties shall be performed under the general supervision of the chief of mission.

In ceremonial matters, attaches are subject to the direction of the chief of mission, and are responsible to him for their personal conduct.

In a circular instruction of February 14, 1906 to certain diplomatic officers requesting them to report on the usage in regard to the presentation of military and naval attaches to the heads of the states to which they were accredited and to the several departments of the governments with which their duties required them to deal, the Secretary of State said:

> It is understood that these attaches are usually presented by their Ambassador or Minister to the head of the State in person, and are in like manner presented to the Minister of War or of the Navy as the case may be, besides being furnished with all other possible facilities for meeting officially and knowing those high in authority in order to enable them to comply with the calls made upon them by their respective Departments for military and naval information.
>
> This is the practice which obtains in Washington . . .
>
> The peculiar and delicate functions of military and naval attaches, combining membership of the official diplomatic representation of their own government with the added privilege of direct intercourse with other than the diplomatic branches of the foreign administration and even of official association, on some occasions with the Head of the State and with the highest officers of its military establishment, make it desirable that American officers serving in those capacities shall enjoy no less privileges than their colleagues of other nationalities.
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> Secretary Root to the diplomatic officers of the United States at posts where a military or naval attache is stationed, Feb. 14, 1906, MS. Department of State, 18 Instructions, Argentine Republic, 80-81.

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> . . . . .military attaches assigned to the foreign diplomatic missions at Washington transact their official business directly with the War Department. They act under the instructions of their own governments and - - - it is understood that their duties are such as may be assigned to them from time to time by their government in respect of obtaining available military information.

(P.460-61)

But it may be said that the immunity applies merely to diplomatic agents accredited to and actually residing within the United States. To which it is replied that such a construction is narrow and literal. It would undoubtedly follow if the immunity in question depended upon the Statute in the nature of an exception which must always be strictly construed and limited, but such construction is wholly inapplicable to a right existing anterior to and independent of the Statute in question. The law of nations must be construed broadly and in a spirit to safeguard any right existing by virtue of the law of nations. It is a separate system of jurisprudence although incorporated bodily in our fundamental law. It must therefore be construed with regard to the origin and nature of the right, irrespective of a provision that provides means for the punishment of its violation.

Now the reason of the immunity has been shown to arise from the necessity of mutual intercourse and it follows that rights and privileges necessary and proper to the enjoyment of the right and privilege must coexist in the right and flow from its existence.

If a diplomatic agent is privileged to enter and to leav an accrediting state, it follows that he must not be debarred the right of returning from his post by the act of a neighboring and friendly state. Otherwise the delay and inconvenience involved might seriously hamper the agent in discharging his duty to the home government and a return by a reasonable and proper route although it lie through a neutral territory is at times necessary as in the case of such a country as Switzerland for example, and at all times convenient.

If there is little law on the question that is due rather to a uniform practice than to any doubt as to the existence of the right or privilege in question. Comity is the basis of much of International Law and custom is the very life of the common law of nations. Convenience, especially if it be international, is a firm basis for comity and passage through neutral territory is certainly convenient.

And it should be observed that the law of nations should not be repealed or modified by implication and it is submitted that a mere omission from a statute of a right or privilege does not repeal a right or privilege based upon International Law. Otherwise the privileges of ambassadors might be impugned as there is no saving clause in the section of the act in question. The provision of the act should be specific and inconsistent with the right or privilege conferred by International Law and if the law in question be construed with International Law it will be seen that an exception does and should exist in the case of diplomatic agents.

Had the attention of the Attorney General been called to the fact that diplomatic immunity does not rest upon the wording of any statute, but is independent thereof, except as to punishment of a violation of such immunity, he would doubtless have held that the question of immunity was untouched by the Statute and not necessarily involved in it.

Non-Interference in Politics

(P.472-73-74)

Chapter I, section 15, of the Foreign Service Regulations of the United States provides (Jan. 1941):

> Officers of the Foreign Service shall not participate in any manner in political matters of the country to which they are accredited or assigned. They shall also refrain from expressing harsh or disagreeable opinions upon local political questions or other controversial subjects.
>
> Ex. Or. 8[illegible], Apr. 18, 1940.

The Secretary of State wrote informally to an Ambassador in Washington on September 28, 1914 that the President of the United States was much annoyed over an interview published in a local newspaper on September 23 which was purported to have been given by a Secretary of the Embassy relating to the unfriendly public opinion in Japan for the United States. The Secretary said that, although the Secretary of the Embassy had publicly denied that the interview was correct, he had admitted that he had made some statement to the reporter in regard to this subject. The Secretary added:

> However disposed the President is to recognize the liability of error in a newspaper report of an oral statement, he cannot but feel that a statement at any time by a diplomatic officer of a foreign government, as to the relations of the United States with another Power, is indiscreet and improper. A statement on such a subject at the present time, when the United States is seeking to preserve a strict neutrality, if it tends to influence American public opinion against one of the belligerents in the war which is being waged, is especially mischievous and arouses suspicion as to the motive which inspired it.

He added that he regretted being compelled to call this matter to the Ambassador's attention and had done so in an informal way so that he might take the first convenient opportunity to call at the Department and discuss the propriety of the Secretary's conduct. The Ambassador replied on September 29 that he agreed with the Secretary of State as to the impropriety of the language of the alleged interview but that, since the Secretary of the Embassy had assured him that he had not made the statements therein contained, he had published a denial in all newspapers. He requested the Secretary of State to bring his reply to the attention of the President.

MS. Department of State, file 701.6211/280½A,/28½.

The Department of State inquired of a foreign minister in Washington in 1920 as to his procedure in calling upon a member of the Foreign Relations Committee of the United States Senate for the apparent purpose of providing the Committee with certain information already requested of the Department in a resolution introduced in the Senate. The Minister gave a very frank statement of what had taken place at the interview and stated that his procedure was due to his unfamiliarity with the established custom of the Government of the United States and that no similar occurrence would take place in the future.

MS. Department of State, file 701.1411/104.

On July 20, 1908 the Venezuelan Minister of Foreign Affairs informed the Minister Resident of the Netherlands that the Supreme Magistrate of Venezuela had directed him to hand him his passports, in view of a letter (apparently criticizing the political and commercial situation in Venezuela) addressed by him to a commercial union in Amsterdam and published in the Netherlands.

John Brewer (custodian of Legation property) to the Secretary of State, July 25, 1908, MS. Department of State, file 14457/8-11; 1909 For. Rel. 630.

A resolution adopted at Habana in 1940 at the Second Meeting of the Ministers of Foreign Affairs of the American Republics recited that the convention on diplomatic officers, signed at Habana on February 20, 1928, established the following principles:

a) Foreign diplomatic officers shall not participate in the domestic or foreign politics of the State in which they exercise their functions.

b) They must exercise their functions without coming into conflict with the laws of the country to which they are accredited.

c) They should not claim immunities which are not essential to the fulfillment of their official duties.

d) No State shall accredit its diplomatic officers to other States without previous agreement with the latter.

e) States may decline to receive a diplomatic officer from another, or, having already accepted him, may request his recall without being obliged to state the reasons for such a decision.

It was accordingly resolved:

To urge the Governments of the American Republics to prevent within the provisions of international law, political activities of foreign diplomatic or consular agents, within the territory to which they are accredited, which may endanger the peace and the democratic tradition of America.

Department of State, III Bulletin, no. 61, p. 130 (Aug. 24, 1940); ibid., no. 62, p. 178 (Aug. 31, 1940)

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DIPLOMATIC IMMUNITIES

Exemption from Judicial Process in General

(P.513,14,15)

In a letter of March 16, 1906 to the Secretary of Commerce and Labor, Secretary Root said:

> There are many and various reasons why diplomatic agents, whether accredited or not to the United States, should be exempt from the operation of the municipal law at (sic) this country. The first and fundamental reason is the fact that diplomatic agents are universally exempt by well recognized usage incorporated into the Common law of nations, bound as it is to observe International Law in its municipal as well as its foreign policy, cannot, if it would, vary a law common to all. If such a law were passed by the proper authority such law would be binding upon Government, courts and people within our jurisdiction, but foreign nations would not be bound to admit its validity in a case properly involving their rights and privileges or duties and obligations. If authority be needed for this assertion it will be found alike in decisions of courts and in works of authority.
>
> . . . . .
>
> The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable to the accredited nation it is proper to request his recall; if the request be not honored he may be in extreme cases escorted to the boundary and thus removed from the country. And rightly, because self-preservation is a matter peculiarly within the province of the injured state, without which its existence is insecure. Of this fact it must be the sole judge; it cannot delegate this discretion or right to any nation however friendly or competent. It likewise follows from the necessity of the case, that the diplomatic agent must have full access to the accrediting state, else he cannot enter upon the performance of his specific duty, and it is equally clear that he must be permitted to return to the home country in the fulfillment of official duty. As to the means best fitted to fulfil these duties the agent must necessarily judge; and of the time required in entering and departing, as well as in the delay necessary to wind up the duties of office after recall, he must likewise judge.
>
> For these universally accepted principles no authority need be cited.
>
> It would appear therefore abundantly clear that the immunities of diplomatic agents exist by virtue of the law of nations which is a part of the law of the land, and that such provisions (sections 4062-4065 of the Revised Statutes) are merely declarative and punitive in their nature.

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". . . .in the United States a foreign diplomatic representative is accorded all the immunities, privileges, and exemptions to which he may be entitled by international law. He is immune from the criminal and civil jurisdiction of the United States and cannot be sued, arrested, or punished by the laws thereof; he is exempt from testifying before any tribunal whatever; his dwelling house and goods and the archives of his mission cannot be entered, searched, or detained under process of law or by the local authorities; but real or personal property held by him aside from that which pertains to him as a public minister is subject to the local laws. The personal immunity of a diplomatic representative extends to his household, and especially to his secretaries. Generally his servants share therein, but this is not always the case when they are citizens of the United States. The statutes on the subject are contained in Sections 4062-4066 of the Revised Statutes . ." Secretary Knox to the Spanish Minister (Riano y Gayangos) no. 97, Jan. 18, 1912, MS. Department of State, file 701.0011/3.

The immunity (under the law of the United States) from criminal prosecution and civil process and from the obligation to testify is considered to apply to a foreign diplomatic representative, his secretaries, attaches, including military, naval and commercial attaches, employees, members of his household, including his family, and domestic servants. Employees or servants of diplomatic missions are entitled to the immunities in question regardless of their nationality with the exception of one case provided for in Section 4065 of the Revised Statutes -- namely where process is founded upon a debt contracted before the employee or servant (a citizen or inhabitant of the United States) entered the service of the mission.

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Exh. NO.

國際法綱領

第四卷

グリーン ヘイウツド ハックワース 著

（抜萃）

第十四章ー國交

隨行（武）官

（四〇一ー四〇二頁）

隨行（武）官の仕事は、所屬各省の長官から命ぜられるものであつて長官から命令をうけ、之に報告するものである。しかしその仕事は大公使の一般的管督のもとに行はれる。

儀禮的な事柄に於ては、隨行（武）官は大公使の指圖に從ひ、その個人的行動に對しては大使に責任をもたねばならぬ。

一九〇六年二月十四日附で一部の外交官に與へられた回覽指令は、派遣される國の元首や、事務上交渉の必要な官廳に隨行武官を披露することに關し、その慣例について報告するよう要求するものであつた。その中で國務長官は述べた。

通例これらの隨行武官は大使乃至公使自身によつて當該國の元首に披

露され、また同様に陸軍或は海軍大臣に被露されることになつてゐる。それ以外の高官にも公式に會見し知己になるための便宜を出來るだけ多く與へられる。それは自國の各省が陸海軍の情報を彼等に求めた時それに應じ得るためである。

以上はワシントンにおける慣例であるーーーー海外駐在武官の任務は特殊である。自國政府の公式な外交代表團の一員であると共に、外國政府の外交部以外の者との直接交際、時には當該國の元首やその軍の主腦部との公式な交際の特權が加つてゐるから、以上の資格で勤務するアメリカ士官は、他國の同僚に決して劣らぬ特權をうけねばならぬ。

一九〇六年二月十四日、ルート國務長官より陸海軍武官の駐在せる任地にある合衆國外交官宛、國務省草稿、指令第十八、アルゼンチン共和國八〇ー八一、ーーーーー駐米外國大公使館附武官は陸軍省と直接その公務を行ふ。彼等は自國政府の指示をうけて行動する。そしてーー彼等の任務は軍事情報入手のため自國政府から時々に課せられるものであると了解されてゐる。

（四六〇ー六一頁）

しかしこの免除が適用されるのは、合衆國に派遣されその國内に實際在住する外交官に對してのみであるとも言ひ得よう。これに對して、そ

のやうな解釋は余りに狹く字義通りであると反駁されてゐる。もしこの免除が右の法令に對する一例外として、常に嚴格に且つ狹義に解釋されねばならぬものとするならば、勿論そのやうなことになるであろう。しかしかゝる解釋は右の法令より以前に又これに關係なく存在しゐた權利に對しては全く通用しない。國際法は、國際法に依つて存在する權利を保護するといふ精神で廣義に解釋されねばならぬ。それは我々の基本法にそのまゝはいつてゐるけれども、別箇の法律系統なのである。故にその違犯に對する罰則を示す法規とは別に、その權利の範圍と性質とに留意して解釋されねばならぬ。

さて免除の理由は國家間相互の交際の必要から生ずるものであると述べた。從つてこの權利特權を受けるに必要且つ妥當な諸權利諸特權は、この權利と共存するものであり、且つこの權利の存在により生ずるものでなければならないことになる。

もし外交官が派遣先の國に出入する特權があるならば、彼が任地から歸國する權利を、近隣友邦の法律が禁じてはならないわけである。さもなければ、これによつて生ずる遲延と不便のために、彼は自國政府に對する任務を遂行することが出來なくなる。中立國經由で歸國するのが合理的且つ妥當な行程である場合が屢々あり、たとへばそれがスイス國の場合には常に必要であり、たいづれの國にとつても便利な方法である。

これに關する法律がないとしても、それは一般に對一的に實行されてゐるからないのであつて、かゝる權利乃至特權の存在が疑問に附せられてゐるからないのではない。多くの場合國際法は厚誼に基くものであり國際法の本質は慣例なのである。特に國際的には便宜といふものが親善の固い基礎であり、中立國内を通過することは、たしかに便利なものである。

次に注意されねばならないことは、國際法は寓意的に廢止乃至修正されるものではない。即ち一つの權利乃至特權が或る法令の文中に記載されてゐるといふ事實は國際法に基くその權利乃至特權の廢止にはならないことである。さもなければ大使の特權は前述の法令に除外條項がないとの理由で、毀損される恐れがある。その法令は特殊のものであり國際法に依つて與へられる權利乃至特權とは一致しないものである。もし當法令が國際法によつて解釋されるならば、外交官の場合には例外が現に存在し、なた存在すべきである。

外交官の免除は、かゝる免除の違犯を罰する目的以外には、如何なる法文にもよるものでなく別箇のものであるといふ事實に、もし檢事總長が留意したのであつたなら、勿論總長は免除の問題は該法令には關係なく從つて必然的に該法令中に包含されてゐないと主張したのであらう。政治に對する不關與

（四七二ー七三ー七四頁）

北米合衆國政府渉外事務取扱規則第一章第一五節は次の様に規定して居る（一九四一年一月）

「渉外事務官吏は其駐在を命ぜられ又は信認狀を奏呈して派遣せられた相手國の政治上の事柄には、如何なる形でも關與してはならない。又其他の爭論の的になつて居る地方的な政治問題に敏越な意見や不愉快を與へるような意見を表明することを愼まなければならぬ。」

一九四〇年四月一八日行政命令第八三九六號

一九一四年九月二十八日國務長官はワシントン駐在の或大使に非公式な書面を送つて合衆國に對する非友好的な輿論が日本に存在することに就いて同大使館の一書記官が話したと稱せらるゝ新聞記者との會見談が九月二十三日の或地方新聞に發表された事を非常に遺憾として居る旨を申入れた。

國務長官の言ふ處では、同書記官はその會見談が正確を缺いてゐるとは云つて居るけれども此問題に關してその記者に何か話をしたことは認めて居るといふのである。國務長官は次のように附言して居る。

「口頭で話した事に就いての新聞報道に間違はあり勝ちだといふことは大統領も認めて居るけれども、たとへどんな時であつても外國政府の外交官が合衆國と他の國との關係に就いて何か意見を述べるといふことは

思慮を缺き且つ至當でないことだと大統領は感ぜずには居られない。合衆國が嚴正中立を守らうとして居る現下の時局に際してかような問題に關する意見が發表せらるゝことは、現在進行中の戰爭の交戰國の一方に對する合衆國の輿論に影響を與へるようなことにでもなつたら殊に宜しくないことであつて發表の動機に就いて疑惑を抱かせるものである。」國務長官は更に本件に就て大使の注意を喚起するの余儀無きに至つた事を甚だ遺憾とし非公式に大使の注意を求めた次第であるから大使が出來るだけ早い機會に國務省を訪ねて同書記官の行動の當否に就て話合ふようせられ度いと附言した。大使は九月二十九日附で返書を送り問題の會見談の用語の當を得なかつたことについては國務長官と同意見であるが大使官書記官は同大使に對して同會見記事にあつたような話はしなかつたと確言したので大使は凡ての新聞に取消を發表してもらつたと同答しその同答を大統領に進達するよう國務長官に依頼した。

國務省書類分類七〇一・六二一一／二八〇 1/2 4、／二八1/2

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一九二〇年國務省はワシントン駐在の或る外國公使に對し、合衆國上院に提案された決議案中に於て既に國務省に要求された或種の情報を、上院の外交委員會に提供しようという意圖を明かに抱いて同公使が同委員會の一委員を訪問した行爲に就いて詰問した。同公使は謝めて卒直にその會談の模樣を述べ、彼の行爲は合衆國政府の確立された慣例に適じて居なかったことから起ったことと並に將來同じ樣なことを決してしない旨を述べた。

國務省、書類分類七〇一、一四一一／一〇四

一九〇八年七月二十日ヴェネズエラの外相は、ヴェネズエラ駐在オランダ公使に對し通告を發し、同公使より正アムステルダムの或商業組合に宛てて發信せられ且つオランダに於て公表せられた或書翰（明らかにヴェネズエラの政治的並に商業的情勢を批評したもの）に鑑み、ヴェネズエラ國元首は同公使にパスポートを交附するよう同外相に命じた旨を傳へた。

デヨーン、プリュアー（公信合衆財人）より國務長官宛、一九〇八年七月二十五日附、國務省書類分類一四四五七七ー一一、一九〇九年渉外六三〇

一九四〇年ハバナに於て開かれた第二回米洲共和國外相會議によって採

擇せられた或決議案は一九二八年二月二十日ハバナに於て調印せられた「外交官に關する協定」が次の原則を確立した旨を引用して居る。

a 外國の外交官は其者が職務を執行する國の國内政治は對外政策に關與してはならぬ。"

b 外國の外交官は彼等が派遣せられた相手國の法律に抵觸しないようにして其職務を執行せねばならぬ。"

c 外國の外交官は其公務の遂行上必要でない免責特權を要求してはならない。

d 如何なる國と雖も相手國の事前の承諾を得ないで其國に派遣すべき外交官を拒否してはならぬ。

e 何れの國も他國から派遣せられた或外交官の承認を、又は其接受に於て其召喚を其決定理由を述べずして拒否し或は要求することが出來る。

右の原則に基いて次のように決議せられた。

アメリカの平和と民主的傳統とを強くする處ある外國外交官の派遣國領土内に於ける政治的活動は國際法規の範圍内に於て之を抑止するよう米洲諸共和國政府に對し要望すること。

(國務省發第六一號一三〇頁(一九四〇年八月二十四日)、同上第六二號一七八頁(一九四〇年八月三十一日))

Def. Doc. #2793

外交官の免責特權

一般訴訟手續からの除外

（五一三、一四、一五頁）

一九〇六年三月十六日の商務勞働長官宛の書翰に於てルート國務長官は次の樣に述べてゐる。

合衆國に派遣されたる外國は外交官は我が國の市民法の適用からなぜ除外せらるべきかについては多くの且又種々の理由がある。

第一の而して根本的な理由は、國際慣習法に表現され廣く認められた慣例によつて外交官は通く除外されてゐるといふ事實である。而してわが國は、その對外政策に於ける國内政策に於ても國際法を遵守する義務があり、たとへ欲したとしても全ての國家に共通な法を變改する權は出來ないのである。若しその樣な法律を當局者が通過したとしても、その法律はわが政府、裁判所並にその管轄内の人民には拘束力をもつが、外國は、その離別特權又は義務實務を本質的に含むやうな場合には、この法律の有效性を認める義務を負はないに相違ない。若しも此の主張に權威が必要であるならばそれは裁判所の判決にも大家の著書にも見出されるであらう。

外交官の免責特權の理由は明白である、卽ち政府はその代表者又は代表者が逮捕又は逃務の遂行を强制的に妨害されるに至によつて、その對外關係を妨げられてはならないのである。若しかかる代表者が派遣國にとつて不快な人物であり彼の行爲が受容すべからざる時には、彼の召還を要求する事が受容である。その要求が受け入れられない時には、彼を國境迄護送し、國外立退きを强制してもよい。それは公正なことである。何故なら自己保存は被害國にあつては當然の權利であり、それなくしては其の存在は保證されないからである。この問題に關しては當該國家が唯一の判定者たるべきである。その採量の權利は、たとへいかに友好的で又有能であらうとも他國に委任することは出來ない。當然の歸結として、外交代表は、また自國と充分の關係を保たなければならぬといふことになる。"これなくしては彼はその特殊任務の遂行に着手する事が出來ない。同じやうに彼が公務を果した時には當國が許されねばならぬといふことも明らかである。これらの任務を果す等に最適な方法は必ず外交官がみずから判斷しなければならず又入國許可に關する事項や召還色の事務の處理に必要な範圍の時間についても彼は同じやうに判斷しなければならない。"

これらの普く認容された慣習法については、いかなる典據をも引用する必要はない。"

故に、外交官の免除特權は、わが國法の一部をなす國際法によつて存し、このやうな規定（改正法四〇六二項より四〇六五項）は單に宣言的且つ刑罰的性質のものであるといふ事は充分に明瞭であらう。

「合衆國に於ては、外國の外交代表は國際法によつて規定されたあらゆる重罪の免除、特權、例外が與へられてゐる。彼は合衆國の刑法民法に拘束されずそれらの法により訴追逮捕乃至處罰せられる事はない。彼は如何なる裁判に於ても證言する必要はない、その住居、所有物、及び彼の任務に關係ある書類は法律手續又は地方官憲によつて侵入、捜査、又は押收され得ない。しかし公的代表者としての彼に關係あるものを除き彼の所持する不動産及動産は關係地方の法律の對象となる。"外交代表者の身分的特權は彼の家族及び時にその書記官達に及ぶ。一般に彼の使用人は右の特權にあづかるが然等が米國市民である時には必ずしもさうではない。"此の點に關する法令は改正法の四〇六二項から四〇六六項に含まれてゐる。"ノックス長官よりスペイン公使（リアノ、イ、ガヤンゴス氏）へ宛てたものである。"國務省書類綴り第七〇一。〇〇一一／三"一九一二年一月十八日第九十七號。

（合衆國の法の下に於ける一この刑事訴訟民事訴訟、證言の義務の免除は

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外国外交代表者、書記官、随員（陸海軍武官、商務官を含む）雇員、彼の家族（家族及び家内使用人を含む）にも適用されたものと考へられてある。雇員使用人は、改正法四〇六元項に規定された唯一の例外、即ち訴訟が雇員又は使用人（合衆国市民又は常住者）が、右外国代表団に雇傭される前に契約した負債に基づいてある時を除いて彼等の雇傭如何に不拘、上記の特権を與へられてあるのである。